United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6073

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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ANTHONY RUSIELEWICZ,

PLAINTIFF-APPELLANT

VS.

CASPAR WEINBERGER, SECRETARY
OF HEALTH, EDUCATION & WELFARE.

DEFENDANT-APPELLEE.

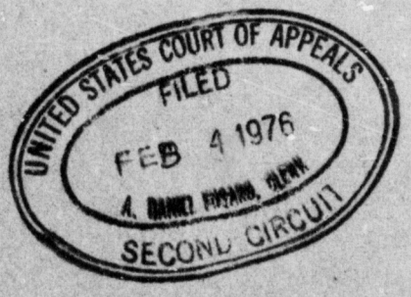
----------x

B
P/S

DOCKET NO. 75-6073

APPEAL;

BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT ANTHONY RUSIELEWICZ, FOR REVIEW OF THE DETERMINATION OF THE SECRETARY OF HEALTH, EDUCATION & WELFARE.



SUBMITTED BY:

MARC L. AMES
ATTORNEY FOR PLAINTIFF-APPELLANT
OFFICE & P.O. ADDRESS:
11 PARK PLACE
NEW YORK, NEW YORK 10007
PHONE:
(212) 962-2390

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

B

----------x

ANTHONY RUSIELEWICZ,

PLAINTIFF-APPELLANT,

VS.

DOCKET NO.: 75-6073

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION & WELFARE,

DEFENDANT-APPELLEE.

----------x

APPEAL;

EXHIBITS A, B, & C INADVERTENTLY OMITTED FROM BRIEF.

SUBMITTED BY:

MARC L. AMES
ATTORNEY FOR PLAINTIFF-APPELLANT
OFFICE & P.O. ADDRESS:
11 PARK PLACE
NEW YORK, NEW YORK 10007
PHONE NUMBER:
(212) 962-2390

From the Desk of

J. L. WESSLER, M. D.

(212) 383-4900

999 LORIMER STREET

BROOKLYN, N. Y. 11222

4-8-75

To whom it may Concern:-

Anthony Pinalemicz

of 192 Java St has amputation of L leg just below knee in 66 He has recurrent tenderness, metastases & hemorrhoma at amputation site. He has to use cane to avoid knee walking.

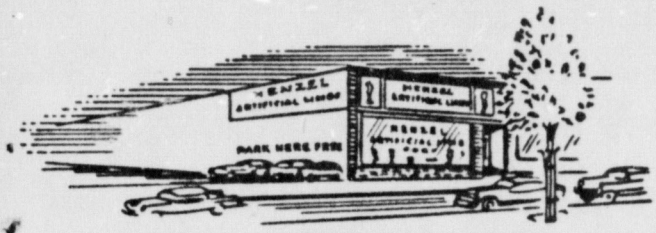
J. Wessler M.D.

Exhibit A

WALTER J. HENZEL, PRES.

596

EST. 1935



Telephone TWINING 8-7326

HENZEL ARTIFICIAL LIMB CORP.

Inventors of the Polymatic Knee Joint

49-06 QUEENS BOULEVARD

NR. ROOSEVELT AVE.

WOODSIDE 77, NEW YORK CITY

Oct. 7/75.

To whom it may concern:

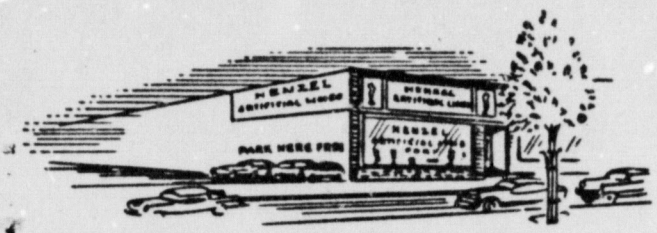
This is to certify that Mr. Anthony Rusiello is in need of a new artificial leg. His present prothesis does not fit anymore and has been adjusted several times due to breakdown of the scar tissue.

Very truly yours,

Walter J. Henzel, Pres.

WALTER J. HENZEL, PRES.

EST. 1935



Telephone TWINING 8-7326

HENZEL ARTIFICIAL LIMB CORP.
Inventors of the Polymatic Knee Joint
49-06 QUEENS BOULEVARD
NR. ROOSEVELT AVE.
WOODSIDE 77, NEW YORK CITY

October 17th 1975.

Tewhom it may concern:

Re: Mr.Anthony Rusielewicz
192 Java Street
Brooklyn,N.Y. 11222.

This is to certify that in the last 3 years the above named patient was quite often in our shop to have nessesary adjustments made to his artificial limb. His stump has very bad scar tissues which no doubt give him a lot of discomfort.

Very truly yours,

Walter J. Henzel.

HENZEL ARTIFICIAL LIMB CORP.

WJH:hh

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§ 416. Additional definitions

For the purposes of this title—

(a) [Repealed]

(b) Wife. The term "wife" means the wife of an individual, but only if she (1) is the mother of his son or daughter, (2) was married to him for a period of not less than one year immediately preceding the day on which her application is filed, or (3) in the month prior to the month of her marriage to him (A) was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (e), or (h) of section 202 [42 USCS § 402(b), (e), or (h)], (B) had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section [42 USCS § 402(d)] (subject, however, to section 202(s) [42 USCS § 402(s)]), or (C) was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 5 of the Railroad Retirement Act of 1937, as amended [45 USCS § 228e].

(c) Widow. The term "widow" (except when used in section 202(i) [42 USCS § 402(i)]) means the surviving wife of an individual, but only if (1) she is the mother of his son or daughter, (2) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (3) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (4) she was married to him at the time both of them legally adopted a child under the age of eighteen, (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died, or (6) in the month prior to the month of her marriage to him (A) she was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (e), or (h) of section 202 [42 USCS § 402(b), (e), or (h)], (B) she had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section [42 USCS § 402(d)] (subject, however, to section 202(s) [42 USCS § 402(s)]), or (C) she was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 5 of the Railroad Retirement Act of 1937, as amended [45 USCS § 228e].

(d) Divorced wives—Divorce. (1) The term "divorced wife" means a woman divorced from an individual, but only if she had been married to such individual for a period of 20 years immediately before the date the divorce became effective.

(2) The term "surviving divorced wife" means a woman divorced from an individual who has died, but only if she had been married to the individual for a period of 20 years immediately before the date the divorce became effective.

(3) The term "surviving divorced mother" means a woman divorced from an individual who has died, but only if (A) she is the mother of his son or daughter, (B) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of 18, (C) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of 18, or (D) she was married to him at the time both of them legally adopted a child under the age of 18.

(4) The terms "divorce" and "divorced" refer to a divorce a vinculo matrimonii.

(e) Child. The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 223(d) [42 USCS § 423(d)]) of such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died or (ii) the

date of enactment of the Social Security Amendments of 1958 [Aug. 28, 1958]; except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B), would have been a valid marriage.

(f) Husband The term "husband" means the husband of an individual, but only if (1) he is the father of her son or daughter, (2) he was married to her for a period of not less than one year immediately preceding the day on which his application is filed, or (3) in the month prior to the month of his marriage to her (A) he was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (f) or (h) of section 202 [42 USCS § 402(f) or (h)], (B) he had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section [42 USCS § 402 (d)] (subject, however, to section 202(s) [42 USCS § 402(s)]), or (C) he was entitled to, or upon application therefor and attainment of the required age (if any) he would have been entitled to, a widower's, child's (after attainment of age 18), or parent's insurance annuity under section 5 of the Railroad Retirement Act of 1937, as amended [45 USCS § 228e].

(g) Widower. The term "widower" (except when used in section 202(i) [42 USCS § 402(i)]) means the surviving husband of an individual, but only if (1) he is the father of her son or daughter, (2) he legally adopted her son or daughter while he was married to her and while such son or daughter was under the age of eighteen, (3) she legally adopted his son or daughter while he was married to her and while such son or daughter was under the age of eighteen, (4) he was married to her at the time both of them legally adopted a child under the age of eighteen, (5) he was married to her for a period of not less than nine months immediately prior to the day on which she died, or (6) in the month before the month of his marriage to her (A) he was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (f) or (h) of section 202 [42 USCS § 402(f) or (h)], (B) he had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section [42 USCS § 402(d)] (subject, however, to section 202(s) [42 USCS § 402(s)]), or (C) he was entitled to, or on application therefor and attainment of the required age (if any) he would have been entitled to, a widower's, child's

(after attainment of age 18), or parent's insurance annuity under section 5 of the Railroad Retirement Act of 1937, as amended [45 USCS § 228e].

(h) Determination of family status. (1)(A) An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this title if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died. If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the wife, husband, widow, or widower, as the case may be, of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a wife, husband, widow, or widower of such insured individual.

(B) In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife, widow, husband, or widower of a fully or currently insured individual, or where under subsection (b), (c), (f), or (g) such applicant is not the wife, widow, husband, or widower of such individual, but it is established to the satisfaction of the Secretary that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, and such applicant and the insured individual were living in the same household at the time of the death of such insured individual or (if such insured individual is living) at the time such applicant files the application, then, for purposes of subparagraph (A) and subsections (b), (c), (f), and (g), such purported marriage shall be deemed to be a valid marriage. The provisions of the preceding sentence shall not apply (i) if another person is or has been entitled to a benefit under subsection (b), (c), (e), (f), or (g) of section 202 [42 USCS § 402(b), (c), (e), (f), (g)] on the basis of the wages and self-employment income of such insured individual and such other person is (or is deemed to be) a wife, widow, husband, or widower of such insured individual under subparagraph (A) at the time such applicant files the application, or (ii) if the Secretary determines, on the basis of information brought to his attention, that such applicant entered into such purported marriage with such insured individual with knowledge that it would not be a valid marriage. The entitlement to a monthly benefit under subsection (b), (c), (e), (f), or (g) of section 202 [42

USCS § 402(b), (c), (e), (f), or (g)], based on the wages and self-employment income of such insured individual, of a person who would not be deemed to be a wife, widow, husband, or widower of such insured individual but for this subparagraph, shall end with the month before the month (i) in which the Secretary certifies, pursuant to section 205(i) [42 USCS § 405(i)], that another person is entitled to a benefit under subsection (b), (c), (e), (f), or (g) of section 202 [42 USCS § 402(b), (c), (e), (f), or (g)] on the basis of the wages and self-employment income of such insured individual, if such other person is (or is deemed to be) the wife, widow, husband, or widower of such insured individual under subparagraph (A), or (ii) if the applicant is entitled to a monthly benefit under subsection (b) or (c) of section 202 [42 USCS § 402(b), (c)], in which such applicant entered into a marriage, valid without regard to this subparagraph, with a person other than such insured individual. For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage.

(2)(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this title, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2), shall nevertheless be deemed to be the child of such insured individual if:

(A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits)—

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his son or daughter,

(II) has been decreed by a court to be the father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,

and such acknowledgment, court decree, or court order was made not less than one year before such insured individual became entitled to old-age insurance benefits or attained age 65, whichever is earlier; or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of the applicant at the time such insured individual became entitled to benefits or attained age 65, whichever first occurred;

(B) in the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he was entitled to old-age insurance benefits—

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his son or daughter,

(II) has been decreed by a court to be the father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,

and such acknowledgment, court decree, or court order was made before such insured individual's most recent period of disability began; or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of that applicant at the time such period of disability began;

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

(i) Disability—Period of disability. (1) Except for purposes of sections 202(d), 202(e), 202(f), 223, and 225 [42 USCS §§ 402(d), (e), (f), 423, 425], the term "disability" means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months, or (B) blindness; and the term "blindness" means central visual acuity of 20/200 or less in the better eye with the use of a correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered for purposes of this paragraph as having a central visual acuity of 20/200 or less. The provisions of paragraphs (2)(A), (3), (4), and (5) of section 223(d) [42 USCS § 423(d)(2)(A), (3)–(5)] shall be applied for purposes of determining whether an individual is under a disability within the meaning of the first sentence of this paragraph in the same manner as they are applied for purposes of paragraph (1) of such section. Nothing in this title shall be construed as authorizing the Secretary or any other officer or employee of the United States to interfere in any way with the practice of medicine or with relationships between practitioners of medicine and their patients, or to exercise any supervision or control over the administration or operation of any hospital.

(2)(A) The term "period of disability" means a continuous period (beginning and ending as hereinafter provided in this subsection) during which an individual was under a disability (as defined in paragraph (1)), but only if such period is of not less than five full calendar months' duration or such individual was entitled to benefits under section 223 [42 USCS § 423] for one or more months in such period.

(B) No period of disability shall begin as to any individual unless such individual files an application for a disability determination with respect to such period; and no such period shall begin as to any individual after such individual attains the age of 65. In the case of a deceased individual, the requirement of an application under the preceding sentence may be satisfied by an application for a disability determination filed with respect to such individual within 3 months after the month in which he died.

(C) A period of disability shall begin—

(i) on the day the disability began, but only if the individual satisfies the requirements of paragraph (3) on such day; or

(ii) if such individual does not satisfy the requirements of paragraph (3) on such day, then on the first day of the first quarter thereafter in which he satisfies such requirements.

(D) A period of disability shall end with the close of whichever of the following months is the earlier: (i) the month preceding the month in which the individual attains age 65, or (ii) the second month following the month in which the disability ceases.

(E) Except as is otherwise provided in subparagraph (F), no application for a disability determination which is filed more than 12 months after the month prescribed by subparagraph (D) as the month in which the period of disability ends (determined without regard to subparagraph (B) and this subparagraph) shall be accepted as an application for purposes of this paragraph.

(F) An application for a disability determination which is filed more than 12 months after the month prescribed by subparagraph (D) as the month in which the period of disability ends (determined without regard to subparagraphs (B) and (E)) shall be accepted as an application for purposes of this paragraph if—

(i) in the case of an application filed by or on behalf of an individual with respect to a disability which ends after the month in which the Social Security Amendments of 1967 is enacted [Jan. 1968], such application is filed not more than 36 months after the month in which such disability ended, such individual is alive at the time the application is filed, and the Secretary finds in accordance with regulations prescribed by him that the failure of such individual to file an application for a disability determination within the time specified in subparagraph (E) was attributable to a physical or mental condition of such individual which rendered him incapable of executing such an application, and

(ii) in the case of an application filed by or on behalf of an individual with respect to a period of disability which ends in or before the month in which the Social Security Amendments of 1967 is enacted [Jan. 1968],

(I) such application is filed not more than 12 months after the month in which the Social Security Amendments of 1967 is enacted [Jan. 1968],

(II) a previous application for a disability determination has been filed by or on behalf of such individual (1) in or before the month in which the Social Security Amendments of 1967 is enacted [Jan. 1968], and (2) not more than 36 months after the month in which his disability ended, and

(III) the Secretary finds in accordance with regulations prescribed by him, that the failure of such individual to file an application within the then specified time period was attributable to a physical or mental condition of such individual which rendered him incapable of executing such an application.

In making a determination under this subsection, with respect to the disability or period of disability of any individual whose application for a determination thereof is accepted solely by reason of the provisions of this

subparagraph (F), the provisions of this subsection (other than the provisions of this subparagraph) shall be applied as such provisions are in effect at the time such determination is made.

(G) An application for a disability determination filed before the first day on which the applicant satisfies the requirements for a period of disability under this subsection shall be deemed a valid application only if the applicant satisfies the requirements for a period of disability before the Secretary makes a final decision on the application. If upon final decision by the Secretary, or decision upon judicial review thereof, such applicant is found to satisfy such requirements, the application shall be deemed to have been filed on such first day.

(3) The requirements referred to in clauses (i) and (ii) of paragraph (2)(C) are satisfied by an individual with respect to any quarter only if—

(A) he would have been a fully insured individual (as defined in section 214 [42 USCS § 414]) had he attained age 62 and filed application for benefits under section 202(a) [42 USCS § 402(a)] on the first day of such quarter; and

(B)(i) he had not less than 20 quarters of coverage during the 40-quarter period which ends with such quarter, or

(ii) if such quarter ends before he attains (or would attain) age 31, not less than one-half (and not less than 6) of the quarters during the period ending with such quarter and beginning after he attained the age of 21 were quarters of coverage, or (if the number of quarters in such period is less than 12) not less than 6 of the quarters in the 12-quarter period ending with such quarter were quarters of coverage;

except that the provisions of subparagraph (B) of this paragraph shall not apply in the case of an individual who is blind (within the meaning of 'blindness' as defined in paragraph (1)).

(j) Periods of limitation ending on nonwork days. Where this title, any provision of another law of the United States (other than the Internal Revenue Code of 1954) relating to or changing the effect of this title, or any regulation issued by the Secretary pursuant thereto provides for a period within which an act is required to be done which affects eligibility for or the amount of any benefit or payment under this title or is necessary to establish or protect any rights under this title, and such period ends on a Saturday, Sunday, or legal holiday, or on any other day all or part of which is declared to be a nonwork day for Federal employees by statute or Executive order, then such act shall be considered as done within such period if it is done on the first day thereafter which is not a Saturday, Sunday, or legal holiday or any other day all or part of which is declared to be a nonwork day for Federal employees by statute or Executive order. For purposes of this subsection, the day on which a period ends shall include the day on which an extension of such period, as authorized by law

or by the Secretary pursuant to law, ends. The provisions of this subsection shall not extend the period during which benefits under this title may (pursuant to section 202(j)(1) or 223(b) [42 USCS §§ 402(j)(1), 423(b)]) be paid for months prior to the day application for such benefits is filed, or during which an application for benefits under this title may (pursuant to section 202(j)(2) or 223(b) [42 USCS §§ 402(j)(2), 423(b) be accepted as such.

(k) Waiver of nine-month requirement for widow, stepchild, or widower in case of accidental death or in case of serviceman dying in line of duty, or in case of remarriage to the same individual. The requirements in clause (5) of subsection (c) or clause (5) of subsection (g) that the surviving spouse of an individual have been married to such individual for a period of not less than nine months immediately prior to the day on which such individual died in order to qualify as such individual's widow or widower, and the requirement in subsection (e) that the stepchild of a deceased individual have been such stepchild for not less than nine months immediately preceding the day on which such individual died in order to qualify as such individual's child, shall be deemed to be satisfied, where such individual dies within the applicable nine-month period, if—

(1) his death—

(A) is accidental, or

(B) occurs in line of duty while he is a member of a uniformed service serving on active duty (as defined in section 210(1)(2) [42 USCS § 410*(1)*(2)]).

unless the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months, or

(2)(A) the widow or widower of such individual had been previously married to such individual and subsequently divorced and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce; or

(B) the stepchild of such individual had been the stepchild of such individual during a previous marriage of such stepchild's parent to such individual which ended in divorce and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce;

except that paragraph (2) of this subsection shall not apply if the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months. For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all

other causes, loses his life not later than three months after the day on which he receives such bodily injuries.

(Aug. 14, 1935, c. 531, Title II, § 216, as added Aug. 28, 1950, c. 809, Title I, § 104(a), 64 Stat. 510; July 18, 1952, c. 945, § 3(d), 66 Stat. 771; Sept. 1, 1954, c. 1206, Title I, § 106(d), 68 Stat. 1080; Aug. 1, 1956, c. 836, Title I, §§ 102(a), (d)(12), 103(c)(6), 70 Stat. 809, 815, 818; July 17, 1957, P. L. 85-109, § 1, 71 Stat. 308; Aug. 30, 1957, P. L. 85-238, § 3(h), 71 Stat. 519; Aug. 28, 1958, P. L. 85-840, Title II, §§ 201, 203, 204(a), Title III, §§ 301(a)(2), (b)(2), (c)(2), (d), (e), 302(a), 305(b), 72 Stat. 1020, 1021, 1026, 1027, 1028, 1030; Sept. 13, 1960, P. L. 86-778, Title II, §§ 207(a)–(c), 208(a)–(c), Title IV, §§ 402(e), 403(c), Title VII, § 703, 74 Stat. 950, 951, 952, 968, 969, 994; June 30, 1961, P. L. 87-64, Title I, §§ 102(b)(2)(D), (c)(1), (2)(B), (3)(C), 105, 75 Stat. 134, 135, 139; Oct. 13, 1964, P. L. 88-650, § 1(a)–(c), 78 Stat. 1075; July 30, 1965, P. L. 89-97, Title III, §§ 303(a)(1), (b)(1), (2), 304*(l)*, 306(c)(13), 308(c), (d)(2)(B), 328(b), 334(a)–(d), 339(a), 344(a), 79 Stat. 366, 367, 370, 373, 377, 378, 400, 404, 409, 412; Jan. 2, 1968, P. L. 90-248, Title I, Part 1, §§ 104(d)(2), 105(a), 111(a), Part 4, §§ 150(a), 156(a)–(d), 158(d), 172(a), (b), 81 Stat. 832, 833, 837, 860, 866, 869, 877; Oct. 30, 1972, P. L. 92-603, Title I, §§ 104(g), 113(a), 115(b), 116(d), 117(a), 118(b), 145(a), 86 Stat. 1341, 1347, 1349, 1350, 1351, 1370.)

§ 421. Disability determinations

(a) Determination by State agency. In the case of any individual, the determination of whether or not he is under a disability (as defined in section 216(i) or 223(d) [42 USCS §§ 416(i), 423(d)]) and of the day such disability began, and the determination of the day on which such disability ceases, shall, except as provided in subsection (g), be made by a State agency pursuant to an agreement entered into under subsection (b). Except as provided in subsections (c) and (d), any such determination shall be the determination of the Secretary for purposes of this title.

(b) Agreement between Secretary and State. The Secretary shall enter into an agreement with each State which is willing to make such an agreement under which the State agency or agencies administering the State plan approved under the Vocational Rehabilitation Act, or any other appropriate State agency or agencies, or both, will make the determinations referred to in subsection (a) with respect to all individuals in such State, or with

respect to such class or classes of individuals in the State as may be designated in the agreement at the State's request.

(c) Review of determination by Secretary. The Secretary may on his own motion review a determination, made by a State agency pursuant to an agreement under this section, that an individual is under a disability (as defined in section 216(i) or 223(d) [42 USCS §§ 416(i), 423(d)]) and, as a result of such review, may determine that such individual is not under a disability (as so defined) or that such disability began on a day later than that determined by such agency, or that such disability ceased on a day earlier than that determined by such agency.

(d) Hearings and judicial review. Any individual dissatisfied with any determination under subsection (a), (c), or (g) shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 205(b) [42 USCS § 405(b)] with respect to decisions of the Secretary, and to judicial review of the Secretary's final decision after such hearing as is provided in section 205(g) [42 USCS § 405(g)].

(e) State's right to cost from Trust Funds. Each State which has an agreement with the Secretary under this section shall be entitled to receive from the Trust Funds, in advance or by way of reimbursement, as may be mutually agreed upon, the cost to the State of carrying out the agreement under this section. The Secretary shall from time to time certify such amount as is necessary for this purpose to the Managing Trustee, reduced or increased, as the case may be, by any sum (for which adjustment hereunder has not previously been made) by which the amount certified for any prior period was greater or less than the amount which should have been paid to the State under this subsection for such period; and the Managing Trustee, prior to audit or settlement by the General Accounting Office, shall make payment from the Trust Funds at the time or times fixed by the Secretary, in accordance with such certification. Appropriate adjustments between the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund with respect to the payments made under this subsection shall be made in accordance with paragraph (1) of subsection (g) of section 201 [42 USCS § 401(g)(1)] (but taking into account any refunds under subsection (f) of this section) to insure that the Federal Disability Trust Fund is charged with all expenses incurred which are attributable to the administration of section 223 [42 USCS § 423] and the Federal Old-Age and Survivors Insurance Trust Fund is charged with all other expenses.

(f) Use of funds by State. All money paid to a State under this section shall be used solely for the purposes for which it is paid; and any money so paid which is not used for such purposes shall be returned to the Treasury of the United States for deposit in the Trust Funds.

(g) Regulations governing determinations in certain cases. In the case of individuals in a State which has no agreement under subsection (b), in the

case of individuals outside the United States, and in the case of any class or classes of individuals not included in an agreement under subsection (b), the determinations referred to in subsection (a) shall be made by the Secretary in accordance with regulations prescribed by him.

(Aug. 14, 1935, c. 531, Title II, § 221, as added Sept. 1, 1954, c. 1206, Title I, § 106(g), 68 Stat. 1081; Aug. 1, 1956, c. 836, Title I, § 103(c)(7), (8), (h), 70 Stat. 818, 823; Jan. 2, 1968, P. L. 90-248, Title I, Part 4, § 158(c)(3), (4), 81 Stat. 869.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This title", referred to in this section, is Title II of the Social Security Act of 1935 and appears as 42 USCS §§ 401, 402–410, 411–418, 420–423, 424a–426, 427–431

"The Vocational Rehabilitation Act", referred to in this section, is Act of June 2, 1920, c. 219, as amended, and appears at 29 USCS §§ 31–42b.

Explanatory notes:

Former 42 USCS § 421 (Act Aug. 14, 1935, c. 531, Title II, § 221, as added July 18, 1952, c. 945, § 3(e), 66 Stat. 772) terminated June 30, 1953, and provided for disability determinations.

Amendments:

1956. Act Aug. 1, 1956, in subsec. (a), inserted "or 223(c)";

In subsec. (c), inserted "(as defined in section 216(i) or 223(c))" and "(as so defined)"; and

In subsec. (e), substituted "Funds" for "Fund" wherever appearing; added the last sentence; and

In subsec. (f), substituted "Funds" for "Fund".

Section 158(e) of Act Jan. 2, 1968, provided that the amendment of subsecs. (a) and (c) of this section by substituting "223(d)" for "223(c)" "shall be effective with respect to applications for disability insurance benefits under section 223 of the Social Security Act [42 USCS § 423], and for disability determinations under section 216(i) of such Act [42 USCS § 416(i)], filed—

1968. Act Jan. 2, 1968, in subsecs. (a) and (c), substituted "223(d)" for "223(c)".

Effective dates:

"(1) in or after the month in which this Act is enacted [January 1968], or

"(2) before the month in which this Act is enacted [January 1968] if the applicant has not died before such month and if—

"(A) notice of the final decision of the Secretary of Health, Education, and Welfare has not been given to the applicant before such month; or

"(B) the notice referred to in subparagraph (A) has been so given before such month but a civil action with respect to such final

§ 423. Disability insurance benefit payments

(a) Disability insurance benefits. (1) Every individual who—

(A) is insured for disability insurance benefits (as determined under subsection (c)(1)),

(B) has not attained the age of sixty-five,

(C) has filed application for disability insurance benefits, and

(D) is under a disability (as defined in subsection (d)),

shall be entitled to a disability insurance benefit (i) for each month beginning with the first month after his waiting period (as defined in subsection (c)(2)) in which he becomes so entitled to such insurance benefits, or (ii) for each month beginning with the first month during all of which he is under a disability and in which he becomes so entitled to such insurance benefits, but only if he was entitled to disability insurance benefits which terminated, or had a period of disability (as defined in section 216(i) [42 USCS § 416(i)]) which ceased, within the 60-month period preceding the first month in which he is under such disability, and ending with the month preceding whichever of the following months is the earliest: the month in which he dies, the month in which he attains age 65, or the third month following the month in which his disability ceases. No payment under this paragraph may be made to an individual who would not meet the definition of disability in subsection

continued

(d) except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity, and no payment may be made for such month under subsection (b), (c), or (d) of section 202 [42 USCS § 402(b), (c), or (d)] to any person on the basis of the wages and self-employment income of such individual. In the case of a deceased individual, the requirement of subparagraph (C) may be satisfied by an application for benefits filed with respect to such individual within 3 months after the month in which he died.

(2) Except as provided in section 202(q) [42 USCS § 402(q)], such individual's disability insurance benefit for any month shall be equal to his primary insurance amount for such month determined under section 215 [42 USCS § 415] as though he had attained age 62 in—

(A) the first month of his waiting period, or

(B) in any case in which clause (ii) of paragraph (1) of this subsection is applicable, the first month for which he becomes entitled to such disability insurance benefits,

and as though he had become entitled to old-age insurance benefits in the month in which the application for disability insurance benefits was filed and he was entitled to an old-age insurance benefit for each month for which (pursuant to subsection (b)) he was entitled to a disability insurance benefit. For the purposes of the preceding sentence, in the case of an individual who attained age 62 in or before the first month referred to in subparagraph (A) or (B) of such sentence, as the case may be, the elapsed years referred to in section 215(b)(3) [42 USCS § 415(b)(3)] shall not include the year in which he attained age 62, or any year thereafter.

(b) Filing of application. An application for disability insurance benefits filed before the first month in which the applicant satisfies the requirements for such benefits (as prescribed in subsection (a)(1)) shall be deemed a valid application only if the applicant satisfies the requirements for such benefits before the Secretary makes a final decision on the application. If, upon final decision by the Secretary, or decision upon judicial review thereof, such applicant is found to satisfy such requirements, the application shall be deemed to have been filed in such first month. An individual who would have been entitled to a disability insurance benefit for any month had he filed application therefor before the end of such month shall be entitled to such benefit for such month if such application is filed before the end of the 12th month immediately succeeding such month.

(c) Definitions of insured status and waiting period. For purposes of this section—

(1) An individual shall be insured for disability insurance benefits in any month if—

(A) he would have been a fully insured individual (as defined in section 214 [42 USCS § 414]) had he attained age 62 and filed

application for benefits under section 202(a) [42 USCS § 402(a)] on the first day of such month, and

(B)(i) he had not less than 20 quarters of coverage during the 40-quarter period which ends with the quarter in which such month occurred, or

(ii) if such month ends before the quarter in which he attains (or would attain) age 31, not less than one-half (and not less than 6) of the quarters during the period ending with the quarter in which such month occurred and beginning after he attained the age of 21 were quarters of coverage, or (if the number of quarters in such period is less than 12) not less than 6 of the quarters in the 12-quarter period ending with such quarter were quarters of coverage;

except that the provisions of subparagraph (B) of this paragraph shall not apply in the case of an individual who is blind (within the meaning of "blindness" as defined in section 216(i)(1) [42 USCS § 416(i)(1)]). For purposes of subparagraph (B) of this paragraph, when the number of quarters in any period is an odd number, such number shall be reduced by one, and a quarter shall not be counted as part of any period if any part of such quarter was included in a period of disability unless such quarters was a quarter of coverage.

(2) The term "waiting period" means, in the case of any application for disability insurance benefits, the earliest period of five consecutive calendar months—

(A) throughout which the individual with respect to whom such application is filed has been under a disability, and

(B)(i) which begins not earlier than with the first day of the seventeenth month before the month in which such application is filed if such individual is insured for disability insurance benefits in such seventeenth month, or (ii) if he is not so insured in such month, which begins not earlier than with the first day of the first month after such seventeenth month in which he is so insured.

Notwithstanding the preceding provisions of this paragraph, no waiting period may begin for any individual before January 1, 1957.

(d) Definition of disability. (1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 216(i)(1) [42 USCS § 416(i)(1)]), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(2) For purposes of paragraph (1)(A)—

(A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 202(e) or (f) [42 USCS § 402(e) or (f)]) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) A widow, surviving divorced wife, or widower shall not be determined to be under a disability (for purposes of section 202(e) or (f) [42 USCS § 402(e) or (f)]) unless his or her physical or mental impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity.

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

(4) The Secretary shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity. Notwithstanding the provisions of paragraph (2), an individual whose services or earnings meet such criteria shall, except for purposes of section 222(c) [42 USCS § 422(c)], be found not to be disabled.

(5) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require.

(Aug. 14, 1935, c. 531, Title II, § 223, as added Aug. 1, 1956, c. 836, Title I, § 103(a), 70 Stat. 815; Aug. 28, 1958, P. L. 85-840, Title II, §§ 202, 204(b), 72 Stat. 1020, 1021; Sept. 13, 1960, P. L. 86-778, Title III, § 303(f), Title IV, §§ 401(a), (b), 402(a), (b), (c), (d), 403(b), 74 Stat. 964, 967, 969; June 30, 1961, P. L. 87-64, Title I, § 102(b)(2)(B), (C), (c)(2)(C), (3)(D), (E), 75 Stat. 134, 135; July 30, 1965, P. L. 89-97, Title III, §§ 302(e), 303(a)(2), (b)(3), (4), (c), 304(m), (n), 328(c), 344 (b)–(d), 79 Stat. 366, 367, 370, 400, 413; Jan. 2, 1968, P. L. 90-248, Title I, Part 1, § 105(b), Part 4, § 158(a), (b), (c)(6)–(8), 81 Stat. 833, 867, 868, 869; Oct. 30, 1972, P. L. 92-603, Title I, §§ 104(c), (d) 116(a), 117(b), 118(a), 86 Stat. 1340, 1350, 1351.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1958. Act Aug. 28, 1958, in subsec. (b), added the last sentence; and

Sec. 404.1524. Medical evidence.

Medical evidence of an individual's mental or physical impairment shall include:

(a) A report signed by a duly licensed physician;

(b) A copy of, or abstract from, the medical records, if any, of a hospital, clinic, institution, or sanatorium, or public or private agency, duly certified by the custodian of such record or by any employee of the Social Security Administration or the Veterans' Administration authorized to make certifications of any such evidence (see § 404.701), or any employee of a State agency authorized to make such certifications; or

(c) Other medical evidence of probative value. Medical reports, copies of medical records or other medical evidence submitted to substantiate an allegation that an individual is under a disability shall include reports of clinical findings (such as the individual's medical history, physical or mental status examinations or both), laboratory findings, diagnosis, and treatment prescribed and response; in cases involving visual impairments, the mensurement of visual acuity and visual fields reported by a duly licensed optometrist may be used. Except where the claim is for the establishment of a period of disaiblity based on statutory blindness (see § 404.1501(b) (1) (ii) and (2) (ii)), such evidence shall also describe the individual's capacity to perform significant functions such as the capacity to sit, stand, or move about, travel, handle objects, hear or speak, and, in cases of mental impairment, the ability to reason or to make occupational, personal, or social adjustments. The clinical and laboratory findings shall be sufficiently comprehensive and detailed to permit the making of independent determinations by the Administration or by a State agency as to the nature and limiting effects of the individual's physical or mental impairment or impairments for the period in question, his ability to engage in physical and mental activities, and the probable duration of such impairment.

REGULATION 1.10 contained in Appendix to Subpart P. 20 CFR

1.10 *Amputation of lower extremity (at or above the tarsal region).*

A. Hemipelvectomy or hip disarticulation; or

B. Evaluate an amputation associated with peripheral vascular disease or diabetes mellitus under the criteria in § 4.13 or § 9.08; or

C. Inability to use prosthesis effectively, without other assistive devices, due to:

1. Vascular disease; or

2. Neurological complications (e.g., loss of position sense); or

3. Stump complications persisting, or expected to persist, for at least 12 months from onset of disability; or

4. Disorder of contralateral lower extremity causing mobility restriction.

REGULATION 12.04 Contained in Appendix to Subpart P. 20 CFR

12.04 *Functional nonpsychotic disorders (psychophysiologic, psychoneurotic and personality disorders)*. Manifested by marked restriction of daily activities and constriction of interests and deterioration in personal habits and seriously impaired ability to relate to other people and persistence of one of the following:

A. Demonstrable structural changes mediated through psychophysiological channels (e.g., duodenal ulcer); or

B. Recurrent and persistent periods of anxiety, with tension, apprehension, and interference with concentration and memory; or

C. Persistent depressive affect with insomnia, loss of weight, and suicidal ideation; or

D. Phobic or obsessive ruminations with inappropriate, bizarre or disruptive behavior; or

E. Compulsive, ritualistic behavior; or

F. Persistent functional disturbance of vision, speech, hearing or use of a limb with demonstrable structural or trophic changes; or

G. Life-long, habitual, and inappropriate patterns of behavior manfested by one of the following:

1. Seclusiveness and autistic thinking; or

2. Antisocial or amoral behavior (including pathologic sexuality) manifested by: (a) inability to learn from experience and inability to conform with accepted social standards, leading to repeated conflicts with society or authority and (b) by psychopathology documented by mental status examination and the results of appropriate, standardized psychological tests; or

3. Addictive dependence on alcohol or drugs, with evidence of irreversible organ damage; or

4. Pathologically inappropriate suspiciousness or hostility manifested by psychopathology documented by mental status examination and the results of appropriate, standardized psychological tests.

ISSUE

The ultimate issue to be decided herein, is whether or not there is substantial evidence to support the determination of the Secretary of Health, Education and Welfare in denying the claimant his benefits. Appellant's reasons for believing that there is not substantial evidence and that the determination was arbitrary and capricious are set forth at length infra.

STATEMENT PURSUANT TO RULE 28(a)(3) FEDERAL RULES OF APPELLATE PROCEDURE AND § 28(2) OF THE COURT RULES.

Mr. Rusielewicz was a claimant for Social Security disability benefits and filed an application for same with the Social Security Administration on August 8, 1972. After benefits were denied him by letter dated October 12, 1972, he requested reconsider tion of the disallowance on October 24, 1972 and the initial disallowance was affirmed by letter dated April 4, 1973. (pp. 70-82 of certified record) Thereafter claimant requested a hearing before an Administrative Law Judge, through his then attorneys Jacowitz and Silverman Esqs., by letter dated August 30, 1973 (p. 37 certified record) Pursuant to said request, a hearing was had on May 8, 1974 before S. Theodore Shapiro, an Administrative Law Judge (ALJ) of the Bureau of Hearings and Appeals in Jamaica, New York. Subsequent to the hearing the claim was again denied by an opinion dated May 17, 1974. (pp. 13-21 ; pp. 22-30 certified record; the opinion of the ALJ appears in duplicate in the record.)

After the denial pursuant to hearing, review by the Appeals Council of the Social Security Administration (hereinafter SSA or the Administration) was requested on June 18, 1974 and again on June 27, 1974 (pp. 9,10 record. One request June 18, was made by the claimant and the other was made by

his then attorneys.)

Ultimately by letter of August 14, 1974, the Appeals Council affirmed the prior determination herein.

On October 10,1974 a complaint was filed in the U.S. District Court for the Eastern District Court of New York, seeking review of the decision of the Secretary of Health, Education and Welfare pursuant to 42USC 405(g). Said matter was assigned for all purposes to Hon. Walter J. Bruchhausen, District Court Judge. After both plaintiff and defendant submitted the pleadings, Judge Bruchhausen found for the defendant and caused his judgment to be entered on June 17, 1975. Plaintiff now appeals from that judgment contending that there is not substantial evidence to support the decision of the Secretary.

THE FACTS

Claimant's age at the time of his hearing was 23, he having been born on September 30, 1950. The claimant completed no more than 7 years of grammar school, having to discontinue his formal education as the result of an accident sustained during the year 1962, ultimately leading to the amputation of his left leg in the year 1965. Between the years 1962 and 1965 claimant suffered greatly from his injuries sustained in the accident, having been in and out of hospitals for the treatment thereof and complications attendant upon said injuries. The record clearly shows that claimant received no other formal education and/or special vocational training. (pp. 45-49 record, claimant's sworn testimony)

The claimant's sole work experience consisted of one job held between March of 1969 and October of 1971, when he was fired as the result of his absence from work. As per his testimony in the record (pp. 49-50, record), his sole work experience consisted of pressing a button on the Xerox machine.

The claimant further testified that he is unable to use public transportation (pp. 47-48, record) and, in fact, his sworn statement to this effect is borne out by the report of Dr. Hershel Samuels dated December 15, 1972, and considered

as Exhibit #14 by the Administrative Law Judge (ALJ). See pp. 108-109, record.

The claimant's physical problems did not cease with the amputation of his leg, as can be seen from his testimony regarding the stump of the amputated limb. He stated that he suffers from phantom pain attendant upon his condition, repeated breakdowns of the stump of his leg, and the necessity of caring for said stump.(pp. 51-56, record.) Additionally, it should be noted from the record (p. 51) that the claimant requires a cane to aid him in ambulating. It also appears from the record that during October of 1971 the claimant fell from a boat while at the Sitting Bull Ranch, and was subsequently hospitalized at Glens Falls Hospital for the injuries which he had sustained. Aside from nearly having drowned, it would appear that the claimant sustained a fracture of his left wrist and laceration of his left arm, either related to the boating accident of 1971 or as the result of some independent occurrence.(pp. 102-105, record) We note from Dr. Samuels' report (pp. 108-109, record) that the claimant complained of occasional pain in this wrist when grasping or lifting objects. We note from the record that the claimant had, while being interviewed by an employee of the Social Security Administration, shown a rather extensive scar of the left wrist to the interviewer. (see page 91, record).

We do not note in the hearing transcript any attempt to expand upon this additional limitation which the claimant stated, at a prior time, he had.

APPLICABILITY OF THE REGULATIONS

The ALJ sets forth, on page 3 of his decision, an excerpt from Sec. 404.1524(c) of the Regulations contained in 20 CFR. We desire to turn our attention to this Regulation infra in connection with our discussion of the substantial evidence rule, and whether or not there was, in fact, substantial evidence to support the findings of the ALJ herein.

There are, however, two pertinent sections of the Regulations, which we desire to focus on presently. They appear in the appendix to Sub Part P of the Regulations contained in 20CFR, and are, accordingly numbered Sec. 1.10C, dealing with amputation of lower extremity, and Sec. 12.04D, dealing with functional non psychotic disorders.

Sec. 1.10C reads as follows:

1.10 Amputation of lower extremity (at or above the tarsal region).
C Inability to use prothesis effectively, without other assistive devices, due to:
1. Vascular disease; or
2. Neurological complications (e.g.,loss of position sense); or
3. Stump complications persisting, or expected to persist, for at least 12 months from onset of disability;or
4. Disorder of contralateral extremity causing mobility restriction.

There is evidence herein that the claimant meets the requirements of this Regulation as to Part C Subdivision 3 thereof. We respectfully call to the Court's attention the

claimant's testimony regarding the repeated breakdowns of his stump, including pain attendant thereon and occasional bleeding (page 54, record). The claimant further indicates to us that breakdowns occur once a week, and that he is required to keep the prothesis off at these times until the stump begins to heal (page 55, record). The claimant reiterates the difficulties with his leg on page 59 of the record, indicating that repeated washings with a disinfectant, such as Phisohex, are necessary to keep the leg clean. The ALJ, as though mocking the claimant's testimony, says, "Got to keep it clean." (page 59, record). In the report of Dr. Samuels, (pp. 108-109, record) it is observed that "There is considerable scarring on the posterior aspect of the stump extending well above the knee." This has the tendency of corroborating the claimant's assertions regarding his stump complications, including pain resulting from scar adhesions and breakdowns of said scar tissue. While there is no direct medical evidence in the record showing observations by a doctor of the breakdowns claimed by claimant, none have been so serious as to require hospitalization, and additionally, the claimant would not have taken a chance on traveling and exacerbating the breakdown of his stump for the sole purpose of appearing at a consultative examination conducted by the Social Security Administration. Thus, at such times as he

was observed by the Social Security Administration, the stump had healed subsequent to any breakdown thereof, and claimant was, at such time, in a condition which would permit him to use his prosthesis albeit with the aid of either a crutch or a cane. We note that as part of the medical history in Dr. Samuels' report, it was recorded that claimant had some drainage from his stump, and had occasional breakdowns in the past. It is further noted from the Doctor's observations that the claimant was using a cane at the time he was examined, and further, that Dr. Samuels concluded that the patient cannot be expected to ambulate unassisted (apparently referring to the use of a cane or some other supportive device) and further, that the claimant could not be expected to use public transportation.

While the claimant's Action for Review was pending in both the District Court and the Court of Appeals, there was had between counsel for the claimant and Michael Cavanagh Esq. of the U.S. Attorney's Office, certain conversations regarding whether or not the claimant met the Regulations herein. There was submitted to Mr. Cavanagh a note dated April 8, 1975 from the claimant's attending physician, indicating that the claimant has "recurrent tenderness, irritations and neuroma in the amputation site. He has to use cane to assist him walking." There were also submitted to Mr. Cavanagh two letters from the Henzel Artificial Limb Corp. indicating the

existence of severe scar tissue and past breakdowns thereof. It is our feeling that this evidence, bolsters the claimant's complaints of stump complication, which do not permit him to use his prosthesis effectively without other assistive devices. Thus through his own testimony and this latter corroboration, he is brought clearly within the provision of Sec. 1.10C3. Lest it be argued by the U.S. Attorney's Office that the Court may not consider this additional evidence from Dr. Wessler, and Henzel Artificial Limb Corp., we respectfully call the Court's attention to footnote #1 in the case of Carnevale v. Gardner (CANY) 1968 383 F.2d 889, wherein the Court stated that while this evidence was not a part of the record, certified to the District Court, it could be considered for the purpose of a remand to insert said evidence in the record and administratively reconsider the claim in light of the new evidence. We attach hereto, as Exhibit A, B & C a copy of that note, which Dr. Wessler provided us, and the two letters from Henzel Artificial Limb Corp.

Section 12.04 Subdivision D of the Regulations aforementioned states as follows:

> Functional nonpsychotic disorders (psychophysiologic, psychoneurotic and personality disorders). Manifested by marked restriction of daily activities and constriction of interests and deterioration in personal habits and seriously impaired ability to

relate to other people and persistence of one of the following:...

D. Phobic or obsessive ruminations with inappropriate, bizarre or disruptive behavior;...

Basically, what this Regulation calls for to qualify as one suffering from a functional non psychotic disorder, is

1. Marked restriction of daily activities.
2. Constriction of interests.
3. Deterioration in personal habits.
4. Impaired ability to relate to others, and
5. Phobic or obsessive ruminations with inappropriate, bizarre or disruptive behavior.

There is evidence in the record that this claimant was not represented by counsel until August 30, 1973, when he retained the firm of Jacowitz and Silverman Esqs. (p. 3, record). It has been held that where the claimant is not represented by counsel, an ALJ has the duty of diligent inquiry and the responsibility of exploring all avenues, which might be fruitful in determining a claimant's eligibility for benefits. See Rosa v. Weinberger (EDNY) 1974 381 F. Supp. 377. We respectfully urge that while the ALJ may have this duty at the time of hearing, where counsel is not present, that the Social Security Administration also has this duty in respect of developing and determining claims prior to the time that they may reach the hands of an ALJ.

We cannot help but feel that if the Social Security Administration were more diligent in this regard, there would be a decreased necessity for hearings in matters of this nature.

The record in this case amply reveals that the claimant spends an average day sitting at home, doing very little, if anything, except on occasion, reading a book and holding his baby. (p. 53, record). Additionally, the record reflects that the claimant has an extraordinary fear of using public transportation, lest he suffer some additional accident, which would further complicate his existing problems as an amputee. This is reflected, not only in the certified record at page 57, but as well, on page 96 of the record, where the claimant expressed this phobic concern to an interviewer of the Social Security Administration, in answer to question VII on form SSA401. We respectfully urge that the evidence herein gives sufficient indication that the claimant may possibly qualify under Sec. 12.04 Sub. D of 20 CFR, appendix to Subpart P., were his statements to the Social Security Administration appropriately analyzed, and were he sent to a Psychiatrist for consultation and an opinion prior to the time that the claimant's insured status expired on June 30, 1973, before he was represented by counsel. It is our feeling from the record herein that had the claimant been questioned closely at that time as per the requisites of the aforementioned Regulation, that he might have been found

to qualify without the need for further evidence herein.

THE REQUIREMENT OF SUBSTANTIAL EVIDENCE and REVIEW BY THE COURT

A. The question posed to the Court in reviewing these matters is whether or not substantial evidence exists to support the findings of the Secretary. The cases construing the requirements of substantial evidence are legion, and it would do us little, if any good, to attempt a comprehensive review of them here. However, to this end, it might be useful to note that the holdings generally are to the effect that substantial evidence is more than a mere scintilla of evidence; it is rather such evidence as might lead a reasonable person to the decision that there was adequate support for the conclusion of the ALJ. See Rosa v. Weinberger (EDNY) 1974 381 F. Supp. 377 and Richardson v. Perales 402 U.S. 389, 91 S.Ct. 1420, 28L. Ed. 2d. 842 (1971). While this constitutes the standard for review, this standard must be viewed in light of the intent of the framers of the law, which requires a liberal construction designed for inclusion rather exclusion. See Rosa v. Weinberger (Supra), Allison v. Celebrezze (W.D. So. Car.) 1964 238 F. Supp. 667. Additionally, it has been stated in construing the law to be applied that the law is a subjective law, to be

> "considered in light of the individual, particular facts and circumstances surrounding such a claim...'but the Act is not concerned with a standard man

> of ordinary and customary abilities, but with the particular person who may claim its benefits and the effect of the impairment upon that person, with whatever abilities or inabilities he has.'"

Allison v. Celebrezze (Supra) at 674. Like holdings of those in Rosa & Allison are to be found in Gold v. Secretary (EDNY) 1972 463 F.2d. 38 and Haberman v. Finch (CANY) 1969 418 F.2d. 664.

B. It is our feeling that there is a decided lack of substantial evidence to support the findings of the ALJ herein. It is respectfully urged that the ALJ fell short in his duties by not discussing the effect of the pain, which claimant tells us, in his sworn testimony, that he consistently suffers from. It is noted that the claimant suffers from two different types of pain, namely, phantom pain and actual pain at the site of his stump. The claimant, in his own way, although extremely inarticulate, tries to impress upon the Judge that the pain keeps him from working. The Judge, who undertook the direct examination of the claimant (p. 45 certified record), asks no questions of the claimant regarding how the pain limits his physical abilities to get about, to concentrate, or how if at all, said pain affects his attention span and ability to learn and comprehend.

What is more, we cannot help but get the impression that the Judge felt a certain degree of intolerance, not only toward the claimant, but to counsel, as well. We note that counsel at the outset of the proceeding sought to raise objection to the admission of Exhibit #16 (p. 111, record) into evidence. Before counsel could even voice the reason for said objection, the ALJ had overruled the objection and permitted him an exception thereto. (page 42, record). Additionally, we cannot help but feel from further evidence thereof that this attitude infected the proceeding to the point where claimant was not given a full and complete hearing herein. Further evidence appears to lie in the fact that when claimant's attorney attempted to sum up the case on page 68 of the record, he was once interrupted by the Judge, and after having completed his first sentence, was again interrupted by the Judge, who called a close to the proceeding. We hardly feel that this is indicative of the level of tolerance which an ALJ should exhibit in these matters.

C. There is, in fact, very little, if any, evidence which is adverse to the claimant in this matter. The Law does not require that the objective evidence establish the claim for disability benefits, but rather that the objective evidence support said claim. See Rosa v. Weinberger (Supra) at page 380 and Dunn v. Richardson (W.D. Mo.) 1971 325 F. Supp.

337, We consider that the objective evidence then in the record, coupled with the claimant's testimony herein, constituted substantial evidence to allow the claim rather than disallow the claim, and in so far as the findings of the ALJ are inconsistent with the substantial evidence in this matter, they should be reversed.

D. We would also call the Court's attention to the fact that Exhibit #16 (p. 111, record) relative to which the claimant's counsel had raised objection, contains a statement that the State Agency for Disability Determinations (S.A.) to which matters of this nature are entrusted for a determination of disability, found that the claimant was, in fact, under a disability from October 31, 1971. Notwithstanding that the S.A. drew this conclusion after having thoroughly explored the claimant's disability, the Social Security Administration did not adopt those findings, and subsequently denied this claim. We feel that this flies in the face of the substantial evidence herein, and that the Social Security Administration acted arbitrarily and capriciously in denying this claim, in light of the findings of its own agent, the State Agency.

Furthermore, in this same connection, we would respectfully call the Court's attention to 42 USC Sec. 421. Subdivisions A and C would seem to be the pertinent portions of

that Statute. Basically, Subdivision A provides that

> "in the case of any individual, the determination of whether or not he is inder a disability...and of the day such disability began...be made by a State Agency pursuant to an agreement entered into under Sub. Sec. (b) except as provided in Sub Sections (c) and (d). Any such determination shall be the determination of the Secretary for the purposes of this Title."

Sub Section (c) in substance permits the Secretary on his own motion to review a determination made by the S.A. and subsequently determine, as a result of the review, that the individual is not, in fact, under a disability. In the instant case, there does not appear to be any cognizance by the Bureau of Disability Insurance of the Social Security Administration that these findings of the State Agency are binding absent the Secretary's desire to review on his own motion. In fact, said findings are not mentioned at all in the certified record with the chance exception that Dr. Marvin M Nachlas, a consulting surgeon to the Bureau of Disability Insurance, mentions the findings of the S.A. in his consulting opinion. We respectfully call to the Court's attention that Dr. Nachlas never examined the claimant, or even saw the claimant with his own eyes. He sets forth such ill conceived statements as "I do not know why he needs a cane, but I am sure that he should be able to walk quite satisfactorily with his prothesis." He further states that the claimant

does not have "an impairment severe enough to meet the medical listings." It is not necessary that a claimant meet the medical listings in Sub Part P to 20 CFR to show his eligibility for benefits. It is only necessary, even though we feel the claimant does, in fact. meet the listings herein, that he bring himself within the spirit and ambit of the Statute, showing that he has been under a disability for at least 12 months, or under such disability as would result in his death, and that he is not capable of substantial, gainful employment on a continued basis. We feel that the claimant has met his burden of proof in this regard.

E. We deal finally with the findings and testimony of the Vocational Expert, upon which the ALJ relies very heavily in determining the eligibility for benefits herein. Before embarking upon an analysis and critique of this aspect of the case, we respectfully point out that the ALJ's decision herein takes some three pages to set forth a brief administrative history of the case, together with the pertinent law and Regulations that govern; that the reporting of the Vocational Expert's testimony herein takes up some three pages of the decision (pp. 27-29, record) and that the vocational and medical history herein is covered over 2 pages (pp. 25-26, record), and that there is a glaring absence of any analysis of the claimant's testimony and/or reconcilitation

of his physical limitations in arriving at the findings of the ALJ, ultimately stated on PP. 29-30, record. We therefore respectfully contend that since the medical evidence was in claimant's favor, and claimant's testimony was credible, the only possible basis for having denied this claim was the findings and testimony of the Vocational Expert.

The ALJ states on page 5 of his decision (p. 27, record) that the Vocational Expert reached his conclusion "by finding out the personality traits claimant had prior to his impairment, acquired skills, and whether or not there were residual capacities present, the nature of the residual capacities present, by using the Dictionary of Occupational Titles." (sic)

Nowhere in the record does it appear that the Vocational Expert made any efforts whatever to determine the claimant's personality traits, either prior to, or for that matter, after his employment. Additionally, it is not clear that the Vocational Expert knew or understood that the sole function, which claimant had on his one and only employment, was to press the copy button of a Xerox machine. Additionally, it does not appear that the Vocational Expert made or offered, through his testimony, any analysis of even the limited skills, which this <u>particular</u> claimant had gained from his prior employment. Additionally, it does not appear that the Vocational Expert stated the nature of claimant's residual

capacities, and how these residual capacities, if any, could be transferred to the various employments, which he had suggested were suitable for this claimant. It astounds us, how a so-called Vocational Expert, can determine what is appropriate employment for this claimant, based upon his search of the Dictionary of Occupational Titles, which is nothing more than a compendium of jobs. There is not even the barest attempt made by the Vocational Expert, or for that matter, the Judge, to relate this particular claimant, with his particular imapirments and problems, to a given type of employment. A flat allegation of residual capacity by the Vocational Expert does not, in our opinion, satisfy the requirement of relating this individual to other jobs and his ability to perform them on a day to day basis, especially when the words, residual capacity, are not defined, and this claimant's residual capacity not specifically set forth.

There is some question in our mind, as well, as to whether or not the Vocational Expert even understood the nature of the claimant's incapacity, his prior medical history and present impairments having been cast and described in the extremely technical language of the medical profession. We note with great interest the case of Hamlet v. Celebrezze in this connection (ED So. Car.) 1965 238 F. Supp. 676, wherein the Court stated at page 681 that

"The medical evidence and reports are couched in the technical and professional language of physicians and without a showing that"... the Vocational Expert. . ."fully comprehended this evidence and these reports, her testimony has no greater weight than the testimony of any other non-physician."

The Court, in that case, felt

"if it is apparent that undue weight has been placed upon the conclusions of an expert witness, which conclusions are based on facts not properly considered or understood, then this Court must take this witness' testimony and place it in perspective when viewing the 'record as a whole' to determine if the Secretary's decision is based on substantial evidence."

It is our feeling that for the purpose of enlightening the Vocational Expert and the ALJ, as well, there should have been called to testify herein, a Medical Advisor, who would have been in a better position to understand the nature and extent of the claimant's limitations, and enlighten not only the Vocational Expert, but the ALJ, as well, relative thereto.

What is more, the Vocational Expert sought to skirt the question of claimant's inability to use public transportation by describing the heroics of others in making arrangements to travel to and from work, so that they would not be encumbered by their limitations in using public transportation. We submit that this evidence, as per objection of the claimant's counsel, was inappropriate, utterly irrelevant and highly prejudicial to the claimant, whose claim is to be judged subjectively, based upon his own limitations.

F. We respectfully direct the Court's attention to page 3 of the ALJ's decision, (p. 25, record) wherein he sets forth an excerpt from Sec. 404.1524(c) governing the evidence to be received and considered regarding an individual's claim for benefits. We submit that if the Judge received the evidence as set forth therein, it was not appropriately considered, and further, it is doubtful that evidence was received at least in regard to the claimant's abilities to handle objects and make occupational, personal and social adjustments.

SUMMARY

In conformity with the arguments advanced herein, we respectfully contend that there was substantial error by the Secretary in deciding this matter, and thereby denying the claimant his right to disability benefits. In short, we contend that he was entitled to such benefits by reason of:

1. The conformity of his impairments with the Regulations.
2. A lack of substantial evidence to support the findings of the ALJ.
3. That claimant was entitled to benefits herein, notwithstanding the Regulations, having brought himself within the ambit and spirit of the Statute through substantial evidence in the record and his own sworn testimony at the time of the hearing.
4. That the opinion of the Vocational Expert is not to be relied upon, in as much as same was highly conclusory, and did not make any attempt to relate this particular claimant's abilities, impairments, work experience and other subjective factors to the Vocational Expert's opinion as to what type of work the claimant might perform on a regular basis. The Vocational Expert's

SUMMARY

If necessary, with the arguments advanced herein, we respectfully contend that there was substantial error by the Secretary [illegible] in this matter, and thereby denying the claimant entitlement to disability benefits. In short, we contend that he was entitled to such benefits by reason of:

1. The conformity of his impairments with the Regulations
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3. That claimant was entitled to benefits herein, notwithstanding the Regulations, having brought himself within the ambit and spirit of the statute through substantial evidence in the record and his own sworn testimony at the time of the hearing
4. That the opinion of the Vocational Expert is not to be relied upon, inasmuch as same was [illegible] conclusory, and did not make any attempt to relate this particular claimant's [illegible] impairments, work experience and other subjective factors to the vocational expert's opinion as to what type of work the claimant might perform on a regular basis. The Vocational Expert

listing of jobs, based only upon his search of the D.O.T. is not sufficient basis for denying benefits.

Wherefore, it is respectfully requested that the Court reverse the findgins of the ALJ herein and award the claimant his benefits purusant to Statute and/or remand the matter for further consideration, and/or order any other and further relief to which the claimant may be entitled and/or which may be appropriate in the interests of Justice.

Respectfully submitted,

Marc L. Ames